

The Future of *Terry* in the Car Context

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INTRODUCTION

An enormous amount of attention has been paid in recent years to the police practice of stopping and frisking citizens on the streets as permitted by *Terry v. Ohio*,¹ and whether expansive use of *Terry* constitutes a form of harassment of minorities.² But there is another significant application of *Terry* that has the potential to broaden its impact in the future: the car context. In 2014, in *Navarette v. California*,³ the Supreme Court addressed whether an anonymous tip from a 911 caller alone could justify a *Terry* stop of a driver, creating reasonable suspicion not only for the single incident alleged—running the caller off the road—but for ongoing criminality—an inference of driving under the influence.⁴ The Court majority held that it could, as the tip satisfied the two elements of reliability—basis

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¹ 392 U.S. 1, 30 (1968) (permitting a police officer to stop a suspect when possessing reasonable suspicion that “criminal activity may be afoot” and to frisk a suspect if possessing a “reasonable fear for his own or others’ safety”).

² See *Floyd v. City of New York*, 959 F. Supp. 2d 691 (S.D.N.Y. 2013) (finding a pattern of racial profiling by police in New York City *Terry* stops); AM. CIVIL LIBERTIES UNION OF ILL., STOP AND FRISK IN CHICAGO 3 (2015), https://www.aclu-il.org/sites/default/files/wp-content/uploads/2015/03/ACLU_StopandFrisk_6.pdf [<https://perma.cc/46VN-KZV4>] (detailing prolific racial profiling by police in Chicago, and concluding that it constitutes “a systemic abuse” of police power). Note this was a consequence anticipated by the *Terry* Court. *Terry*, 392 U.S. at 17 (describing a frisk as “a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment”).

³ 134 S. Ct. 1683 (2014).

⁴ *Id.* at 1691 (arguing the reasonableness of concluding that the “alleged conduct was a significant indicator of drunk driving”).

of knowledge and veracity of the informant.⁵ But each prong of this rather formalist analysis was comprehensively dismantled by one of the Court's great modern formalists, Justice Scalia, in a stinging dissent.⁶ Oral argument in *Navarette* suggested that despite the legalistic manner in which the majority opinion was written, the true concern of most of the majority coalition justices was far more pragmatic: that serious wrongdoing, be it throwing bombs from a car,⁷ or holding a kidnapped child in the vehicle,⁸ could not be effectively investigated by a police officer except by pulling the car over. The ineffective effort of Lorenzo Prado Navarette and José Prado Navarette's advocate to assuage this concern during oral argument illustrates how this pragmatic problem, in contrast to the formalist rationales the Court ultimately gave, is far harder to rebut.⁹ This Article argues that this pragmatic concern has special application to the car context, and for this reason we are likely to see *Terry* expanded further in the car context in future cases.

It does so in two ways. First, it examines the formalist-pragmatist division of the Roberts Court, which is particularly salient in criminal procedure. Nowadays, it is common for legal scholars and media commentators alike to talk about Supreme Court cases in terms of a left-right division,¹⁰ but they have trouble explaining the "disordered" coalitions¹¹ that appear regularly in the Court.¹² But importantly, those disordered coalitions are particularly evident in constitutional

⁵ *Id.* at 1688–89 (“[W]e conclude that the call bore adequate indicia of reliability for the officer to credit the caller’s account. The officer was therefore justified in proceeding from the premise that the truck had, in fact, caused the caller’s car to be dangerously diverted from the highway.”).

⁶ See *infra* Part I.

⁷ Transcript of Oral Argument at 3–5, *Navarette v. California*, 134 S. Ct. 1683 (2014) (No. 12-9490), <https://www.oyez.org/cases/2013/12-9490> [<https://perma.cc/84WE-KK8Y>].

⁸ *Id.* at 22–23.

⁹ For example, when Chief Justice Roberts asked whether a police officer could pull a car over in response to a report that a child had just been kidnapped off the streets, petitioner’s advocate was unable to differentiate such a situation from that of the instant case, and had to concede, “[w]ell, Your Honor, if . . . that’s all they have to go on, then under *Florida v. J.L.* they would not.” *Id.* at 17–18. For a more detailed discussion, see *infra* note 61 and accompanying text.

¹⁰ See Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 44–45 (2008) (“Once a term bandied about almost exclusively by social scientists or statisticians, the ‘median Justice’ has now entered the legal and even public lexicon.”).

¹¹ Paul H. Edelman et al., *Consensus, Disorder, and Ideology on the Supreme Court*, 9 J. EMPIRICAL LEGAL STUD. 129, 135 (2012) (defining and describing how to measure the extent to which cases defy the usual left-right ordering).

¹² Cases that do not follow a left-right division are described, for example, as “odd-bedfellows coalition of justices,” Adam Liptak, *No Majority Rationale in Crime Lab Testimony Ruling*, N.Y. TIMES, June 19, 2012, at A13, and the underlying facts are described as unusual in “scrambl[ing] the usual ideological alliances,” Adam Liptak, *Justices Allow DNA Collection After an Arrest*, N.Y. TIMES, June 4, 2013, at A1, A15.

criminal procedure cases.¹³ Justice Scalia, one of the most conservative justices ever to serve on the Supreme Court,¹⁴ often sided with defendants in Fourth Amendment cases,¹⁵ as well as Sixth Amendment cases,¹⁶ and Justice Breyer, one of the Court's most liberal justices,¹⁷ frequently sides with the prosecution in both Fourth¹⁸ and Sixth Amendment cases.¹⁹ Supreme Court judicial behavior is in fact better understood not in terms of a single left-right dimension of judicial decision-making, but in terms of two dimensions, one ideological and one of legal methodology. Importantly, the two dimensions can cut across each other, forcing justices to decide between achieving their preferred substantive outcome and following their favored methodological approach. Understood in this way, both the majority and dissenting opinions in *Navarette*, as well as the distribution of the justices within those camps, make much more sense. The superior legal arguments of the dissent were unable to persuade the majority justices, liberal and

¹³ As well as statutory interpretation cases—see Joshua B. Fischman & Tonja Jacobi, *The Second Dimension of the Supreme Court*, 57 WM. & MARY L. REV. 1671, 1704 (2016) (discussed in detail *infra* Part II).

¹⁴ The most commonly used contemporary measure of judicial ideology has Justice Scalia with an average score of 2.50, more than one standard deviation (2.14) from the historical average (-0.06), and second only in conservatism to Justice Thomas, with a score of 3.52. Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002). The numbers reported here and throughout this Article are based on the Martin-Quinn scores updated as of April 2017 (data available at <http://mqscores.berkeley.edu/measures.php> [<https://perma.cc/R569-2QPA>]) (updated annually).

¹⁵ From his first criminal procedure opinion, *Arizona v. Hicks*, 480 U.S. 321, 324–25 (1987) (finding that any unauthorized touching of an object amounts to a search), to more recent cases, e.g., *United States v. Jones*, 565 U.S. 400, 404 (2012) (finding that installing a GPS tracking device on a car constitutes a search); *Florida v. Jardines*, 133 S. Ct. 1409, 1414–18 (2013) (finding that the special protection of the home renders a dog sniff of the curtilage a search requiring probable cause)—Justice Scalia demonstrated this tendency.

¹⁶ In both right to jury trial cases and Confrontation Clause cases—see, respectively, e.g., *Giles v. California*, 554 U.S. 353, 362 (2008) (prohibiting hearsay statements by a murder victim due to unavailability of the witness to testify as a result of defendant's wrongdoing, because the murder was not committed in order to prevent the admission); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009) (prohibiting admission of chemical drug tests without the in-person testimony of the scientist who conducted the test).

¹⁷ Justice Breyer has an average Martin-Quinn score of -1.13, more than half a standard deviation left of the historical center of the Court. Martin & Quinn, *supra* note 14.

¹⁸ *Utah v. Strieff*, 136 S. Ct. 2056, 2058 (2016) (finding that in the absence of flagrant police misconduct, discovery of a valid, pre-existing arrest warrant attenuates any connection between an unlawful stop and any evidence found during the stop); *Maryland v. King*, 133 S. Ct. 1958, 1958 (2013) (finding that taking and analyzing a cheek swab of a lawfully arrested suspect's DNA is a reasonable police booking procedure).

¹⁹ See, e.g., *Giles*, 554 U.S. at 396 (Breyer J., dissenting) (objecting to the exclusion of evidence out of concern for the effect on domestic violence prosecutions); *Michigan v. Bryant*, 562 U.S. 344, 358 (2011) (finding a murder victim's statements to be non-testimonial and thus admissible due to the emergency circumstances of the statement and to prevent manipulation of the right to confrontation).

conservative alike, because the majority in that case was largely constituted by pragmatists, and the debate at oral argument made clear that those justices were worried about hamstringing police in the special context of *Terry* as applied to cars.

Second, once the significance of pragmatism is considered in this area, much of the doctrine makes more sense and the exceptionalism of cars under *Terry* becomes evident, as does the likely future path of *Terry* in the car context. The Court has addressed in detail the differences between cars and other types of searches and seizures in crafting four automobile-related exceptions to the warrant requirement;²⁰ yet little analysis has been given to how different *Terry* stops, and developing reasonable articulable suspicion (RAS) to justify such stops, are in the car context. But there is good pragmatic reason to think that *Terry* car stops and *Terry* street stops are meaningfully different, and reason to think that the Court thinks so too, even though it has not articulated the difference.²¹

When police officers have a suspicion of wrongdoing by a person on the street, they can undertake a limited seizure in the form of a *Terry* stop, but they can also simply observe the person or engage the suspect in voluntary conversation, neither of which requires any suspicion.²² In contrast, when police suspect wrongdoing by the driver of an automobile, it is not physically possible for police to engage the suspect in voluntary conversation because the person is driving—to

²⁰ *Chambers v. Maroney*, 399 U.S. 42, 48 (1970) (recognizing a general automobile exception to the warrant requirement); *New York v. Belton*, 453 U.S. 454, 445 (1981) (extending the search incident to arrest exception to contemporaneous searches of the passenger compartment of a vehicle). *But see Arizona v. Gant*, 556 U.S. 332, 332 (2009) (ruling that police officers must demonstrate an actual and continuing threat to their safety posed by an arrestee, or a need to preserve evidence related to the crime of arrest, to meet the search incident to arrest exception in the car context); *Michigan v. Long*, 463 U.S. 1032, 1033 (1983) (permitting a *Terry* frisk or protective sweep of a car without probable cause but subject to RAS); *South Dakota v. Opperman*, 428 U.S. 364, 364 (1976) (permitting police to inventory a vehicle that is lawfully impounded without first obtaining a warrant).

²¹ While it is possible that the Chief Justice was simply confused between the car exception to the warrant requirement and the application of *Terry* in the car context, arguably instead he was testing out whether similar justifications for the automobile exception, i.e. a diminished expectation of privacy associated with cars, *California v. Carney*, 471 U.S. 386 (1985), might also justify looser rules for *Terry* stops of cars, when, at oral argument, he said, “I was just going to say, we have held that the . . . standards are loosened in the vehicle context because your expectation of privacy is diminished when you’re out on the road driving along in . . . a vehicle. Does that have any pertinence?” Transcript of Oral Argument at 11, *Navarette v. California*, 134 S. Ct. 1683 (2014) (No. 12-9490).

²² *Terry v. Ohio*, 392 U.S. 1, 28 (1968) (approving Officer McFadden “hailing [defendants], identifying himself as a police officer, and asking their names” prior to having RAS); *Id.* at 32–33 (Harlan, J., concurring) (describing the liberty of an officer “to address questions to other persons,” but also acknowledging the person’s “equal right to ignore his interrogator and walk away”); *Id.* at 34 (White, J., concurring) (“There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets.”).

stop him is to seize him.²³ It is also more difficult to build reasonable suspicion in the car context through close observation: on the street, police can observe recognized articulable factors such as furtive glances, but this is far harder to do of a person in a moving vehicle. As such, in the car context, if the police are suspicious of a driver but do not have reasonable suspicion, they have only three options: pull the car over without reasonable suspicion, which is unlawful; allow the vehicle to continue and potentially escape further observation, which is clearly unacceptable in the more serious examples proposed during *Navarette*'s oral argument; or follow the car and observe the vehicle in the hope that the driver commits an additional driving offense for which he can be stopped,²⁴ which is both time-consuming and effectively raises the standard to one of probable cause. There is no middle ground. The terms of the *Terry* jurisprudence prior to *Navarette* gave the police much more limited options in the car context; *Navarette* created additional policing options, but only by disingenuously applying *Terry*.

What this means is that all of Justice Scalia's artful rebutting of Justice Thomas's formal analysis was for nothing. In terms of argumentation, the dissent was far more persuasive than the majority, as Part I shows. But that does not mean that, as a policy matter, the Court or society wants drivers who have potentially committed serious offenses to be free to go just because the police were not there to witness the infraction. The point of this Article is not to argue whether *Navarette* was right or wrong, but to show how the divisions on the Court mean that such distinctions are going to continue to be drawn, absent a considerable change on the Court. With the passing of Justice Scalia, the conservative justice most likely to side with the liberals for formalist reasons, and with the liberal Justice Breyer willing to side with the conservatives on pragmatist matters, the likely ongoing coalition will be the pragmatist liberal Breyer, the pragmatist conservatives Justices Alito, Kennedy, and to a large extent Roberts, and the extreme conservatism of Justice Thomas.²⁵ That means that scholars who do not want to see *Terry* expanded in the car context need to come up with a pragmatic solution, not continue to argue purely formalist positions. That may be difficult, because cars *are* different, as the Court has recognized in other contexts. At the same time, scholars who favor this expansion of *Terry* ought to develop more convincing rationales for their position, because the majority's logic was unpersuasive and it leaves the jurisprudence muddled. Consequently, the *Navarette* majority provides little guidance as to how the Court can reconcile prior

²³ *Id.* at 16 (majority opinion) ("whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person").

²⁴ This Article uses the male pronoun to refer to the suspect and the female pronoun to refer to the police officer and the tipster, both to promote clarity and because the Court generally considers issues from the point of view of a presumptively male suspect. See Jesse-Justin Cuevas & Tonja Jacobi, *The Hidden Psychology of Constitutional Criminal Procedure*, 37 CARDOZO L. REV. 2161, 2161 (2016).

²⁵ The expected position of the Court's newest member, Justice Gorsuch, is discussed *infra* text accompanying note 80.

jurisprudence with other controversies concerning Terry stops in the car context that are currently being faced by lower courts.²⁶ Understanding the importance of pragmatism to many of the Supreme Court justices will help predict similar future cases.

Part I discusses the majority and dissenting opinions in *Navarette* and shows that the formalist arguments of the majority are unpersuasive. Part II proposes that pragmatic concerns actually drove most of the majority justices to permit Terry stops in cases where police have only an anonymous tip. It first examines the extent to which the Roberts Court justices are formalist or pragmatist in general, and shows that the four justices who joined Thomas's majority opinion are the most pragmatist on the Court; it then shows how those justices expressed highly pragmatist concerns at oral argument in *Navarette*. Part III argues that there is good reason to treat *Terry* differently in the car context, both for the pragmatic reasons expressed by the justices in *Navarette* and for other reasons, including looking ahead to likely future cases. The Conclusion considers the different options for dealing with the fact that cars do present a different context for *Terry*.

I. WHEN AN ANONYMOUS TIP IS NOT REALLY ANONYMOUS

In *Navarette*, an anonymous 911 caller alleged that a vehicle had run her off the road, described the specific spot on the highway where the incident had happened, gave the license plate of the vehicle, and claimed that the incident had occurred within five minutes of the report.²⁷ Thirteen minutes after receiving notice of the call, a California Highway Patrol officer spotted the vehicle nineteen miles from the specified location, and within five minutes had pulled the truck over. On approaching the vehicle, both the officer who conducted the stop and a backup officer who had arrived reported smelling marijuana, and a search of the truck bed revealed thirty pounds of marijuana.²⁸ The complex question that these simple facts raise is whether an anonymous tip alone can provide RAS for a stop, either generally or in this particular context.

Although information from the public can be relevant to RAS,²⁹ ordinarily, without more, an anonymous tip by itself is inadequate.³⁰ Yet occasionally a tip from an anonymous source alone can constitute RAS if it supplies "sufficient

²⁶ See *infra* text accompanying notes 93–111.

²⁷ *Navarette v. California*, 134 S. Ct. 1683, 1686–87 (2014).

²⁸ *Id.* at 1687.

²⁹ *Adams v. Williams*, 407 U.S. 143, 147 (1972) (finding that RAS need not be based solely on an officer's personal observation and that informants' tips can constitute relevant information).

³⁰ *Alabama v. White*, 496 U.S. 325, 329 (1990) ("an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity inasmuch as ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations and given that the veracity of persons supplying anonymous tips is 'by hypothesis largely unknown, and unknowable.'") (quoting *Illinois v. Gates*, 462 U.S. 213, 237 (1983)).

indicia of reliability to provide reasonable suspicion.”³¹ In *Alabama v. White*, the anonymous tipster not only provided numerous details, but also predicted behavior by the suspect, and the police subsequently corroborated some of those details, although not others.³² Thus the extent and corroborated accuracy of the information that the anonymous tipster provided suggested a familiarity with the suspect that indicated reliability; and although each element predicted by the tip was innocent, that familiarity with innocent information “imparted some degree of reliability” to the allegations of criminality made by the tipster.³³ However, in reaching this conclusion, the *White* Court specified that the case was a close one.³⁴ Thus, the tip in *Navarette* would have to provide a similar indicia of reliability in order to make it over the line.

Arguably, instead, the tip in *Navarette* more closely resembled the tip that failed to meet the RAS standard in *J.L.*. As the Court had previously warned when recognizing the potentially valuable information contained in a tip:

[T]ips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. . . . Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized.³⁵

In *J.L.*, the anonymous tip that a black teenage boy standing at a specified bus stop and wearing a plaid shirt was carrying a gun “provided no predictive information and therefore left the police without means to test the informant’s knowledge or credibility.”³⁶ Although the tip did predict where the boy would be, the Court explained that:

An accurate description of a subject’s readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable *in its assertion of illegality*, not just in its tendency to identify a determinate person.³⁷

³¹ *Id.* at 327.

³² *Id.* at 332.

³³ *Id.*

³⁴ *Id.*

³⁵ *Adams v. Williams*, 407 U.S. 143, 147 (1972).

³⁶ *Florida v. J.L.*, 529 U.S. 266, 271 (2000).

³⁷ *Id.* at 272 (emphasis added).

The circumstances of *Navarette* closely resemble the circumstances of *J.L.* In both, an anonymous tipster gave a description of an alleged wrongdoer and reported where that person would be—albeit in *Navarette*, the accuracy of the location had to be inferred from the direction that the truck was traveling and the distance likely to have been traversed in that time. But neither tipster made a prediction, because each tip alleged illegality but did not provide any information that indicated that the allegation of criminality was reliable. In *White*, the inference of reliability regarding criminality was indirect, coming from the extent and accuracy of the predictions of the innocent information, but it did exist. In contrast, in both *J.L.* and *Navarette*, there was no information in the tip that in any way indicated that the underlying allegation was likely to be true—that is, there was nothing in the tip to establish its veracity. And neither tip displayed specialized knowledge not available to any person on the street with a grudge against the suspect—that is, there was no indication of basis of knowledge of the informant.

The majority in *Navarette* worked hard to show that the anonymous tipster in the instant case met that low threshold,³⁸ however, each element was revealed to be quite flimsy by the powerful dissent. Justice Thomas’s majority opinion deemed that the 911 call in *Navarette* “bore adequate indicia of reliability” to constitute RAS for four reasons.³⁹ First, by reporting that she had been run off the road, the caller was claiming eyewitness knowledge; in contrast, in *J.L.* the tipster did not explicitly claim to have seen the gun.⁴⁰ The dissent responded emphatically that this fact “supports *not at all* its veracity,” pointing out that “[t]he issue is not how she claimed to know, but whether what she claimed to know was true.”⁴¹ That criticism seems apt: it is just as easy for a person to lie by reporting that she saw something than by reporting that she had been told something.

Second, Thomas deemed that the fact that the truck was found at the expected location indicates that the caller was telling the truth because it constitutes a contemporaneous report, and compared the report to the excited utterances exception to the hearsay rule.⁴² The dissent pointed out that this neither constituted a prediction, since anyone seeing the car could report its location,⁴³ nor, since the caller had time to note down the license plate, was it likely that the report had the

³⁸ The threshold was lower than that required in *Illinois v. Gates*, 462 U.S., 213, 238 (1983) (declaring that probable cause should involve “a practical, common-sense decision whether, given all the circumstances . . . including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability” of criminality), a difference justified by the lower standard of RAS compared to probable cause. *Alabama v. White*, 496 U.S. 325, 330 (1990) (“reasonable suspicion can arise from information that is less reliable than that required to show probable cause”).

³⁹ *Navarette v. California*, 134 S. Ct. at 1683, 1688–90 (2014).

⁴⁰ *Id.* at 1689.

⁴¹ *Id.* at 1693 (Scalia, J., dissenting).

⁴² *Id.* at 1689 (majority opinion) (comparing FED. R. EVID. 803(1) with FED. R. EVID. 803(2)).

⁴³ *Id.* at 1693 (Scalia, J., dissenting).

kind of immediacy associated with an excited utterance or present sense impression.⁴⁴ The more damning criticism that the dissent failed to make is that although the caller predicted the *location* of the car, this gave no indication of the reliability of the allegation of *criminality*. For this reason, it resembled *J.L.* rather than *White*.

Third, Thomas argued that the use of the 911 emergency system meant that an anonymous call is not necessarily truly anonymous. This is because: first, calls are recorded and thus create the possibility of voice identification; and second, some limited tracking capacity of at least the geographic location of a caller may now or in the future be made by cell phone carriers.⁴⁵ But the dissent rightly responded that this should not matter unless it is reasonable to conclude that the *caller* was aware of this possible tracking, as that will shape whether or not she was likely to be lying.⁴⁶

Finally, Thomas submitted that while the caller only alleged one isolated incident, a police officer could reasonably suspect that the behavior alleged was caused by drunk driving, a common cause of erratic driving and an ongoing form of criminality.⁴⁷ The dissent listed a range of possible other explanations, from animus to distraction by cell phone, and suggested that any conclusion that drunk driving was more likely than the alternatives does not rise to the level of RAS.⁴⁸ This dispute is more evenly balanced between the two sides: it is essentially a battle between two empirical claims, neither of which have any evidence to support them. The dissent also argued, more effectively, that the failure of the police to observe any further evidence of drunk driving in the five minutes in which they followed the truck before pulling it over essentially discredited the tip.⁴⁹

Unusually, the majority opinion made no response to the dissent's biting criticisms, even though Scalia colorfully accused Thomas of "serv[ing] up a freedom-destroying cocktail consisting of two parts patent falsity."⁵⁰ Overall, the dissent clearly got the better of each of the four arguments. Why, then, did four other justices sign on to this rather weak opinion?

II. THE PULL OF PRAGMATISM

The answer lies in what the justices in the *Navarette* majority have in common. It certainly is not ideology: in 2015, the ideological spectrum of the

⁴⁴ *Id.* at 1694.

⁴⁵ *Id.* at 1690 (majority opinion).

⁴⁶ *Id.* at 1694 (Scalia, J., dissenting).

⁴⁷ *Id.* at 1690 (majority opinion).

⁴⁸ *Id.* at 1695 (Scalia, J., dissenting).

⁴⁹ *Id.* at 1696.

⁵⁰ *Id.* at 1697.

majority coalition spanned more than two standard deviations of the entire historical spread of the Court since 1937.⁵¹ Ideologically, then, the *Navarette* coalition was highly disordered. Instead, although Thomas wrote the opinion in fairly formalistic fashion—hinging the opinion on questions such as identification by an eyewitness rather than indirect knowledge—the other justices in the coalition are far more pragmatic than formalist, and the concerns driving those justices were pragmatic concerns, not formalist criteria.

To see that the four justices joining Thomas's majority opinion are pragmatists, consider Figure 1, created by Fischman and Jacobi.⁵² It shows the voting patterns of the second natural Roberts Court, from the 2010 through 2012 Terms, scaled by disagreement between pairs of justices. Much like a fairly accurate map can be created by taking a list of distances between cities and inferring their relative placements, the voting patterns of the justices, and the extent to which they vote together, can be used to scale their relative positions. Most often, this is done by simply representing the justices on a single left-right dimension, which is typically interpreted as judicial ideology.⁵³ However, judicial accounts,⁵⁴ legal scholarship,⁵⁵ and even social science analysis,⁵⁶ suggest that legal methodology also shapes judicial behavior.

⁵¹ In 2015, Justice Breyer had a Martin-Quinn score of -1.41 and Justice Thomas scored at 3.14. Martin & Quinn, *supra* note 14. Two standard deviations cover 95% of a normal distribution.

⁵² Fischman & Jacobi, *supra* note 13 at 1697.

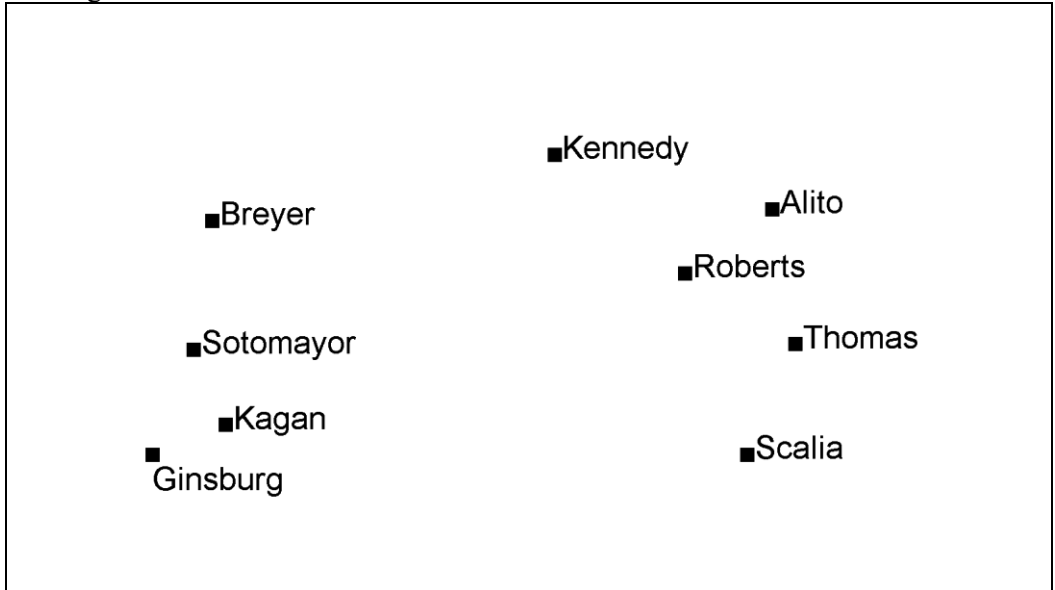
⁵³ See, e.g., Martin & Quinn, *supra* note 14.

⁵⁴ Judges regularly profess to be influenced by judicial methodology, including textualism, formalism, purposivism, consequentialism, minimalism, and concerns for judicial role. See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005); WILLIAM H. REHNQUIST, *THE SUPREME COURT* (1987); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

⁵⁵ See, e.g., Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335 (1998).

⁵⁶ See, e.g., Lawrence Baum, *What Judges Want: Judges' Goals and Judicial Behavior*, 47 POL. RES. Q., 749, 756–57 (1994) (“The empirical evidence mustered by scholars who dismiss this legal goal as a consideration for justices is far from conclusive. . . . this evidence establishes only that individual justices vote on the basis of relatively fixed policy positions. In turn, those positions could result from a mix of considerations, including the legal goal of accurate interpretation, rather than policy goals alone.”); Herbert M. Kritzer & Mark J. Richards, *Taking and Testing Jurisprudential Regimes Seriously: A Response to Lax and Rader*, 72 J. POL. 285 (2010).

Figure 1: The Roberts Court 2010–12 Terms Measured in Two Dimensions



Source: Fischman and Jacobi, *supra* note 13, at 1697.

These two dimensions are not based on any measured input (such as degree of agreement with the government); rather, they are a summary of the pattern of the justices' votes in the cases. As such, it is up to the viewer to infer what the dimensions consist of. Fischman and Jacobi argue that the vertical dimension in Figure 1 represents a methodological dimension: essentially the division between formalism and pragmatism.⁵⁷ The most pragmatic justices, then, are Justices Kennedy, Breyer, Alito, and Chief Justice Roberts—the four justices who joined Thomas's *Navarette* majority opinion. Fischman and Jacobi show that those justices regularly vote together in cases that do not divide along traditional ideological lines, and that this division is statistically significant in explaining judicial votes.⁵⁸ They also show that cases dividing along methodological lines are particularly common in criminal procedure cases.⁵⁹

To confirm that practical concerns were central for the four justices joining the majority opinion in *Navarette* in particular, we need only look to the oral

⁵⁷ Fischman and Jacobi, *supra* note 13, at 1709. They define formalists as those who generally “prefer categorical application of rules, even in situations where the background justifications of the rule apply weakly, or not at all.” *Id.* They define pragmatists as those who “prefer to apply rules narrowly, especially in settings where the application of a rule might conflict with its purpose. Thus, pragmatists favor balancing tests and particularized rules, which provide judges greater discretion to achieve fair results in individual cases.” *Id.*

⁵⁸ *Id.* at 1698–1709.

⁵⁹ Along with statutory interpretation cases. *Id.* at 1704.

arguments. The first question by the justices, asked within the first minute by Chief Justice Roberts, was over such a practicality:

So if the tip . . . is this car is driving by and throwing bombs out the window, okay, every, you know, whatever, 500 yards, the police find the car, they have to wait until they see the person actually throw a bomb out the window themselves before pulling them over?⁶⁰

Later, the Chief Justice presented another horrific hypothetical that the Navarettes' argument, if accepted, would prevent the police from effectively responding to:

What if there's no way for the officer to corroborate the allegation? You know, you see . . . somebody on the street grab a young child, throw her in the trunk of the car, and then take off. And somebody calls with an anonymous tip saying this fellow, you know, in this car has got a child in the trunk. The police can follow the person, you know, for hours and they're not going to see any corroborating evidence. Can they pull that car over?⁶¹

The Navarettes' advocate Paul R. Kleven had to admit that there was no distinction between the instant case and the hypothesized scenario. Clearly dissatisfied, Roberts repeated his question: "So just . . . your answer in that case is that the police cannot pull that car over?"⁶² Kleven could only respond that the seriousness of the problem does not create a different test under *Terry*. In response, Roberts expanded the hypothetical:

It's a . . . a one-lane . . . two-lane road going down, but it merges into, you know, an eight-lane expressway. You have one police car. It's going to be hard for that police car to maintain surveillance. And you say they've just got to let them go.⁶³

Kleven repeated his position and Roberts asked the question once again, to which Kleven gave essentially the same answer, causing Justice Kennedy to joke, "You get an A for consistency. I'm . . . not sure about common sense."⁶⁴

It is exactly this kind of common sense concern that the pragmatic majority justices seemed to be driven by. The majority justices raised other pragmatic arguments. Justice Alito wondered how, under the Navarettes' proposal, it would

⁶⁰ Transcript of Oral Argument at 3–4, *Navarette v. California*, 134 S. Ct. 1683 (2014) (No. 12-9490).

⁶¹ *Id.* at 17–18.

⁶² *Id.* at 18.

⁶³ *Id.*

⁶⁴ *Id.* at 19.

be practical for police to corroborate an anonymous tip in this context.⁶⁵ Similarly, he questioned how a person could report observing drunk driving when they can only observe the effects of presumed drunkenness.⁶⁶ And he queried how the police could observe deliberate, rather than alcohol induced, reckless driving when the individual can drive better when the police catch up with him, only to return to reckless driving when the police are forced to leave him unstopped due to lack of RAS.⁶⁷ Justice Breyer expressed concern about the seriousness of the offense alleged and whether that made it unnecessary to turn to the question of drunk driving.⁶⁸ Roberts questioned Kleven about how common the problem of false tips actually is,⁶⁹ and then questioned Assistant Solicitor General Rachel P. Kovner, arguing in support of the State, about the danger of the Court creating an incentive for false tips,⁷⁰ as well as the danger of the police abusing a more lax rule.⁷¹

In contrast, the dissenting justices were concerned with more formal issues raised by the case. At oral argument, those justices raised questions about the elements of RAS, which both the majority and the dissenting opinions eventually centered on. Justice Sotomayor repeatedly raised the significance of the report of firsthand knowledge,⁷² and questioned whether the suspicion of running someone off the road could be taken to create suspicion of drunk driving.⁷³ They also raised slippery slope and line drawing problems: For instance, Justice Scalia questioned whether reports of “driving really irresponsibly” or cutting a person off in their lane would justify a stop,⁷⁴ and Sotomayor asked whether “any moving violation

⁶⁵ *Id.* at 5 (“Well, how would you corroborate it? Let’s say the person calls up and gives a name and gives an address? So what would be necessary? What would the police have to do then before they could stop the vehicle other than observing the vehicle do something illegal?”).

⁶⁶ *Id.* at 43 (“Well, how would somebody . . . who observes another car driving ever be able to say that person was drunk? All they could . . . observe is what they see.”).

⁶⁷ *Id.* at 45 (“Now, if the police catch up with that person, of course, the person’s going to slow down while the police follow the person. And then when the police decide to stop, they’re going to go back to engaging in this intentional, extremely dangerous conduct.”).

⁶⁸ *Id.* at 55–56 (“I mean, on many sections of that road in Mendocino County you drive someone off the road, they are dead.”).

⁶⁹ *Id.* at 9 (“Do we have any indication that this is a serious problem? The false tips?”).

⁷⁰ *Id.* at 52 (“I’m talking about the concern that you want to have the police pull over people that you don’t like, where you know somebody’s got something bad in the car and you don’t like it, and so you’re going to take advantage of the fact that the police don’t have to observe anything and yet you can still get them to pull over this person.”).

⁷¹ *Id.* at 56 (“What about the danger from the police side? In other words, they know or they suspect that the guy driving the white car has a lot of marijuana in the trunk. They have no basis for pulling him over. And they say, well, guess what, we got an anonymous tip that he was driving erratically, so we pulled him over.”).

⁷² *Id.* at 16 (differentiating the instant case from *J.L.* in which there was “[n]o reason to believe the caller had personal knowledge.”).

⁷³ *See, e.g., id.* at 27 (“[i]s every reckless driving drunk driving?”).

⁷⁴ *Id.* at 41–42.

counts,” including changing lanes without signaling.⁷⁵ These are slippery slope arguments, just as many of the questions posed by the majority were; the difference is that the majority justices worried about the effect of such slippage for hampering actual crime-fighting, whereas the dissent worried about slippage for jurisprudential principles in the Fourth Amendment.

Finally, the justices who ultimately dissented expressed concerns over jurisprudential consistency. Sotomayor asked, “Why don’t we just stick to our general standard?”⁷⁶ And Justice Kagan posited that considering the seriousness of the crime alleged in assessing whether RAS exists, as the government was advocating, “would seem to me to work quite a substantial change in . . . Fourth Amendment law.”⁷⁷

Not only did these justices focus on formal concerns, Scalia made quite explicit that he was entirely unconcerned with pragmatic matters, even potential extreme consequences of ruling against the government. Scalia added to the Chief Justice’s above hypothetical, asking, “[W]hat if . . . the tip is this person has an atomic bomb given him by Al Qaeda; he is driving it into the center of Los Angeles to . . . eradicate the entire city, okay. Let it go?”⁷⁸ In response, Klevan conceded that that would be an extreme circumstance in which there could be an exception. But then Scalia tried to push him to take the extreme formalist position, saying “I want you to say the Court shouldn’t. Let the car go. Bye-bye, Los Angeles.”⁷⁹

While Scalia may have been being jurisprudentially and methodologically consistent, this line of argument did not help him form a majority coalition, because it was exactly this kind of cost of formalism that the majority was unwilling to bear—or impose on society.

The Roberts Court’s three most formalist justices—as seen in Figure 1—Justices Ginsburg, Scalia, and Kagan, were joined by the methodologically moderate Sotomayor, but they could not garner a fifth vote. Now with Scalia gone, it is uncertain if they can even reliably extract a fourth vote. It is possible that Justice Neil Gorsuch may effectively replace Scalia on this issue as both a formalist and a conservative. As one commentator put it, “He is an ardent textualist (like Scalia); he believes criminal laws should be clear and interpreted in favor of defendants even if that hurts government prosecutions (like Scalia)”⁸⁰ But it is possible that his conservatism may trump his formalism, leading him to

⁷⁵ *Id.* at 49.

⁷⁶ *Id.* at 13.

⁷⁷ *Id.* at 37. *See also id.* at 45 (“[b]ut all crime represents a threat to public safety, and yet we have these standards.”).

⁷⁸ *Id.* at 19.

⁷⁹ *Id.* at 23.

⁸⁰ Eric Citron, *Potential Nominee Profile: Neil Gorsuch*, SCOTUSBLOG (Jan. 13, 2017, 12:53 PM), <http://www.scotusblog.com/2017/01/potential-nominee-profile-neil-gorsuch> [<https://perma.cc/3NJ7-WNS6>].

side more often with the State than Scalia did, and look more like Thomas, who is more formal but nonetheless has a consistently conservative record in criminal procedure cases.⁸¹ As such, a fourth vote to stem the expansion of *Terry* in the car context may be difficult to find, and a fifth vote is extremely unlikely, rendering the coalition in *Navarette* highly likely to arise commonly in such cases. Consequently, those concerned with an expansion of *Terry* in the car context need to develop pragmatist arguments against that outcome. But it will be difficult, because *Terry* does apply differently in the car context more generally, not just within the confines of *Navarette*, as the next Part shows.

III. BEYOND *NAVARETTE*: WHY *TERRY* IS DIFFERENT IN THE CAR CONTEXT

The facts of *Terry* exemplify how RAS can ordinarily be built through observation. In the facts of that case, initially the investigating officer, Officer McFadden, had only the sort of “inarticulate hunch[]” that cannot constitute RAS.⁸² He described his initial reaction on observing the three suspects by saying “when I looked over they didn’t look right to me.”⁸³ But McFadden did not need to act immediately on having his suspicions raised. Instead, he observed the men from a few hundred feet away for over ten minutes, witnessing two of them walk past a store over a dozen times, closely examine it, and confer with a third man.⁸⁴ These additional facts together were far more suggestive of casing a store for a robbery, and McFadden was able to build RAS.⁸⁵ Thus, a pragmatist need have little worry that a police officer will lack the opportunity to intervene on the basis of RAS before a crime has actually been committed on the streets.

But that is far harder to do in the car context. In *Navarette*, the officers did follow the car for five minutes, but were unable to observe any additional suspicious behavior.⁸⁶ Police are necessarily farther away from a suspect who is driving, and so they cannot observe a suspect’s physical demeanor, facial expressions, furtive glances, whispered conversations, etc., as they can a suspect on the street. Essentially, they can only observe the state of his vehicle or the quality of his driving. That effectively means that police officers are restricted to building RAS on the basis of factors such as illegal lane changes, observed

⁸¹ For example, writing the majority opinions in *Samson v. California*, 547 U.S. 843, 846 (2006) (permitting suspicionless searches of parolees), and *Bd. of Educ. v. Earls*, 536 U.S. 822, 822–23 (2002) (permitting suspicionless drug testing of school students involved in extracurricular activities).

⁸² *Terry v. Ohio*, 392 U.S. 1, 22 (1968).

⁸³ *Id.* at 5.

⁸⁴ *Id.* at 6.

⁸⁵ With these additional facts, the Court concluded that “It would have been poor police work indeed for an officer of 30 years’ experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further.” *Id.* at 23.

⁸⁶ *Navarette v. California*, 134 S. Ct. 1683, 1686–87 (2014).

reckless driving, or lack of registration. But these examples, and most facts that are likely to be observed in this context, constitute probable cause to believe a crime is being committed, not reasonable suspicion. The *Navarette* decision essentially responded to the fact that, as a practical matter, police will effectively need probable cause to stop a suspicious vehicle, by instead deeming that RAS can be established without evidence of criminality, since subtle clues of criminality cannot effectively be garnered in the car context.

Furthermore, on the street, police officers are not restricted to simple observation. They can interact with the suspect directly, to the extent that the suspect voluntarily cooperates. Conversation, generally in the form of questioning, can lead to incriminating statements. Such conversations can also lead to police officers observing suspicious conduct based upon circumstances that would not be apparent to an officer observing from a distance. For instance, an officer may see a bulge consistent with a gun in the suspect's pocket; or she may smell marijuana or some other illegal substance emanating from the suspect; or she may observe his dilated pupils or other signs of drunkenness or intoxication. These suspicious characteristics and forms of conduct are difficult or impossible to observe from the distance between two vehicles.

Even if the suspect on the street does not cooperate, the act of not voluntarily cooperating can also provide information relevant to building RAS. For instance, running away from the police is relevant to RAS, and can even provide RAS alone if it occurs in a high crime neighborhood.⁸⁷ Alternately, the suspect failing to meet the eye of police can be characterized as furtive glances, a very common factor in RAS.⁸⁸

In the car context, a vehicle can flee from police, but differentiating between fleeing and simply continuing driving is made difficult unless the car speeds away, changes lanes quickly, or makes other such diversionary maneuvers. Consequently, once again, in the car context police have to rely on factors that constitute probable cause. As a result, in the car context police have far fewer options to build RAS than they have on the street.

When suspicious of a driver but lacking RAS, police face three unpalatable options: First, pull the car over without reasonable suspicion. That would be unlawful, and exclusion would ordinarily apply.⁸⁹ Second, allow the vehicle to

⁸⁷ *Illinois v. Wardlow*, 528 U.S. 119, 119 (2000) (ruling that unprovoked flight from the police in a high crime neighborhood constitutes reasonable suspicion).

⁸⁸ Furtive glancing is one of the most common factors relied on by New York police officers to justify a stop, reported in over half of documented stops (51.85%), second only to the area having a high incidence of crime (58.75%). Tonja Jacobi, Song Richardson & Gregory Barr, *The Attrition of Rights Under Parole*, 87 S. CAL. L. REV. 887, 961 (2014). Of those stops, police documented on average only 1.6 factors, making furtive gestures, despite constituting a highly subjective and arguably minimally probative factor of suspicion, enormously significant in justifying RAS. *Id.*

⁸⁹ Subject to any good faith exception, *see, e.g.*, *Heien v. North Carolina*, 135 S. Ct. 530, 534 (2014) (expanding the good faith exception to the exclusionary rule to include an officer's reasonable mistake of law), or lack of marginal deterrence of applying the exclusionary rule, *Herring v. United*

continue and potentially escape further observation. That option was unacceptable to *Navarette*'s majority, as illustrated by the list of horrors raised at oral argument. Or third, follow the car and observe the vehicle in the hope that the driver commits an additional driving offense for which it can be stopped. That option is both resource- and time-consuming and also effectively raises the standard for *Terry* vehicle stops to one of probable cause. Without *Navarette*, there was no middle ground. With *Navarette*, police have additional options to prevent highly undesirable outcomes, be it facing exclusion of evidence, allowing criminals to escape with kidnapped children, or effectively preventing police from relying on *Terry*'s lower RAS standard. But in doing so, *Navarette* clearly expanded RAS to circumstances without strong indicia of criminality, at least in the car context.

The opinion gave no explicit recognition that its ruling was confined to the car context, and so it may be that *Navarette* expanded *Terry* more generally. However, the differences described in this Part are unlikely to spur at least the liberal Justice Breyer to apply that expansion beyond the car context. And even the more conservative justices seemed at *Navarette*'s oral argument, if not in the opinion, to recognize the exceptionalism of the car context. They made comments and asked questions that impliedly referred to the second and third of the trifecta of unpleasant options described above. Justice Alito illustrated the sway of wanting to avoid these two options when he criticized the *Navarettes*' advocate for making what Alito considered an expansive argument, saying, "what you're saying is they really can never stop a vehicle no matter what kind of a tip they get, unless they see the vehicle committing an illegal act."⁹⁰ That is, either the police have to let the vehicle go or find probable cause. Advocate Kleven and Justice Scalia reluctantly drove home Alito's point by further describing the second unpleasant option: In developing the point that the tip must show criminality, not simply reliability regarding innocent facts, Scalia said, "Following the car is going to do them no good as to whether he drove . . . somebody off the road."⁹¹ Kleven's answer illustrated the practical problem: "They're not going to prosecute for the reckless driving that allegedly took place 19 miles away . . . [given that] the person who's making the claim is . . . nowhere to be found."⁹²

As such, it is unlikely that *Navarette* applies to all *Terry* stops. In fact, it may only apply to the narrow circumstances that *Navarette* directly covered: deeming police to have RAS based solely on an anonymous tip whose only evidence of criminality is that the alleged wrongdoing was claimed by the potentially unreliable tipster to have occurred in front of her. But cases are already arising

States, 555 U.S. 135, 147–48 (2009) (ruling that any application of the exclusionary rule must "pay its way" in terms of marginal deterrence of police misconduct).

⁹⁰ Transcript of Oral Argument at 8, *Navarette v. California*, 134 S.Ct. 1683 (2014) (No. 12-9490).

⁹¹ *Id.* at 25.

⁹² *Id.* at 25–26.

where other expansions of *Terry* can be expected in the car context. But by plugging a practical hole with jurisprudential fudging, the *Navarette* majority opinion provides little direction for future courts in addressing similar issues.

The potential broader application of judicial attempts to avoid the first undesirable option—simply letting the potential wrongdoer go without further investigation, due to the limitations of the car context—is illustrated by a recent cert petition. In *Gilliam v. Nebraska*, the Court was asked to consider:

Whether an individual inside a parked vehicle is seized within the meaning of the Fourth Amendment to the United States Constitution when a police officer activates a cruiser's emergency lights while positioned directly behind the parked vehicle, approaches the vehicle, knocks on the window of the vehicle, and directs the occupant to roll down the window.⁹³

This remains an open question because the Supreme Court denied the petition for cert.⁹⁴ The case is nevertheless worth discussing, not only to see how other judges are attempting to avoid the first option, but also because in doing so, the lower court has arguably further expanded *Terry* in the car context.

In *State v. Gilliam*, police received a tip that a car was “parked partially on the curb and partially on the street” in a specified location; when the police officer arrived, the car was not where it had been described but instead was found on a nearby street, parked lawfully.⁹⁵ Officer Wagner parked behind the vehicle, activated his patrol unit's overhead lights, exited his patrol car, knocked on the window, and directed driver Gilliam to roll down his window.⁹⁶ When Gilliam complied, Wagner observed “a strong odor of alcohol on his breath; watery, bloodshot eyes; and slurred speech.”⁹⁷ Wagner then conducted a DUI investigation and arrested Gilliam for DUI; Gilliam sought suppression of all observations by Wagner on the basis that he was already seized without RAS when Wagner had approached the vehicle.⁹⁸

The Nebraska Supreme Court concluded that the initial interaction between Gilliam and Wagner was not a seizure but rather a consensual encounter involving voluntary cooperation, and so Wagner's observations could be used to build reasonable suspicion, which he had by the time he began his DUI investigation.⁹⁹

⁹³ Petition for Writ of Certiorari at i, *Gilliam v. Nebraska*, 137 S. Ct. 371 (2016) (No. 15-1384).

⁹⁴ *State v. Gilliam*, 874 N.W.2d 48 (Neb. 2016), *cert denied*, 137 S. Ct. 371 (2016) (mem.).

⁹⁵ *Id.* at 52.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 52–53.

⁹⁹ *Id.* at 52–53, 59–60.

It pointed to the absence of any indication of threat by the officer,¹⁰⁰ that Gilliam was in a public place, was approached by Wagner alone and on foot, without Wagner “display[ing] his weapon, us[ing] a forceful tone of voice, touch[ing] Gilliam, or otherwise [telling] Gilliam that he was not free to leave.”¹⁰¹ Gilliam argued that Wagner’s “activation of his patrol unit’s overhead lights was a show of authority that transformed the initial encounter into a seizure.”¹⁰² But the Court considered that “there are a variety of reasons that officers may activate their overhead lights,” including “to alert the car’s occupants that they [are] going to approach the vehicle” and to avoid the officer having to put himself at risk by approaching a parked car late at night without adequate illumination.¹⁰³ It ruled that a reasonable person would understand that there are such various reasons for an officer activating his lights, and so the reasonable person would not believe himself not free to leave.¹⁰⁴

It is difficult to credit the claim that a reasonable person would feel free to exit the vehicle and walk away, or else to ignore the knock of the police on his window, when an officer has approached after triggering her emergency lights. Both appellate and state courts have ruled that the activation of emergency lights “unquestionably qualifie[s] as a show of authority,”¹⁰⁵ even though an officer may have done so purely as a safety precaution,¹⁰⁶ and that “[a] reasonable person

¹⁰⁰ Such as “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen’s person, or the use of language or tone of voice indicating the compliance with the officer’s request might be compelled.” *Id.* at 55.

¹⁰¹ *Id.*

¹⁰² *Id.* at 54.

¹⁰³ *Id.* at 54–56 (quoting *United States v. Clements*, 522 F.3d 790, 794 (7th Cir. 2008)). This reasoning highlights another pragmatic concern that the Supreme Court has previously worried about: the special danger to the police in the car context. In *United States v. Robinson*, the Court stressed the special danger to police officers when stopping a person in an automobile, citing statistics that “a significant percentage of murders of police officers occur[] when the officers are making traffic stops.” 414 U.S. 218, 234 n.5 (1973).

¹⁰⁴ *Gilliam*, 874 N.W.2d at 54–56.

¹⁰⁵ *United States v. Griffin*, 652 F.3d 793, 798 (7th Cir. 2011); *State v. Walp*, 672 P.2d 374, 375 (Or. Ct. App. 1983) (“A reasonable person would not feel free to drive away once the officer turned on the emergency lights. Use of the overhead lights was a sufficient show of authority” to constitute a Terry stop); *State v. Yeagan*, 958 S.W.2d 626, 635 (Tenn. 1997) (“When an officer turns on his blue lights, he or she has clearly initiated a stop.”); *State v. Burgess*, 657 A.2d 202, 203 (Vt. 1995) (finding that “the conduct of the police in displaying blue lights after pulling in behind defendant’s stopped vehicle constituted a stop”); *State v. Stroud*, 634 P.2d 316, 318 (Wash. Ct. App. 1981) (finding that suspect was seized “at the moment the officers pulled up behind the parked vehicle and switched on the flashing light.”).

¹⁰⁶ *Brooks v. State*, 745 So.2d 1113, 1113–14 (Fla. Dist. Ct. App. 1999) (determining that even if the lights were activated as a safety precaution, “a reasonable person under such circumstances would not have believed he or she was free to leave and terminate the encounter.”); *Burgess*, 657 A.2d at 203 (considering that police may have activated the lights out of a subjective intent to promote safety, but the reasonable person would nevertheless consider themselves stopped).

would not feel free to drive away once the officer turned on the emergency lights.”¹⁰⁷ Others have explicitly pointed to the absence of activated emergency lights as evidence against a seizure.¹⁰⁸ However, this raises the difficult question of how a police officer who wishes to avoid unlawfully stopping a person she suspects of driving under the influence can nonetheless effectively investigate that potential crime, and do so without endangering her own safety. How can a studious police officer engage a suspect in voluntary cooperation in this context without making the reasonable person feel he is not free to leave or not engage with the officer? A pragmatic Supreme Court is unlikely to direct the police officer to approach the car without activating lights that may be necessary to ensure the officer’s safety,¹⁰⁹ nor is it likely to tell police officers they cannot investigate such a crime, given the high rate of deaths associated with driving under the influence,¹¹⁰ nor will it tell police officers to make a stop without RAS. As such, the same undesirable three options arise in the car context even when the car is stopped.

The solution the Court crafted in *Navarette* to this trilemma was to tweak the standard of RAS in the car context by claiming, not very convincingly, that an anonymous call is not really anonymous;¹¹¹ as such, all a tipster needs to do to make a 911 call reliable is to say that she saw the (potentially fabricated) incident. But that does not really address the central problem: that the practice *Terry* authorized, and the reasons animating its authorization, play out differently in the car context. In a car, unlike on the streets, police are often unable to build RAS, and have to choose between three unpleasant options: unlawfully stop the car without reasonable suspicion; permit the driver to avoid further investigation and so risk the dire possibilities considered during *Navarette*’s oral argument; or follow the car in the hope of building probable cause.

Thus, those who are unhappy with *Navarette* should be wary of future cases that the Court takes concerning vehicles, as it is quite likely that the pragmatic justices will create another workaround that expands *Terry* without acknowledging

¹⁰⁷ *Walp*, 672 P.2d at 375.

¹⁰⁸ *Miller v. Harget*, 458 F.3d 1251, 1257 (11th Cir. 2006) (finding the officer did not do anything that would appear coercive to a reasonable person, such as “draw[ing] his gun, giv[ing] any directions to [suspect], or activat[ing] his roof lights.”).

¹⁰⁹ In fact, the four justices joining Justice Thomas’s opinion in *Navarette* explicitly warned of the danger of creating a “perverse incentive” for police officers to potentially put themselves in harm’s way so as to be able to investigate, in response to the ruling in *Arizona v. Gant* hinging an officer’s ability to search a vehicle on whether a suspect is fully restrained. 556 U.S. 332, 362 (2009) (Alito, J., dissenting).

¹¹⁰ According to the Center for Disease Control and Prevention: “[i]n 2014, 9,967 people were killed in alcohol-impaired driving crashes, accounting for nearly one-third (31%) of all traffic-related deaths in the United States.” *Impaired Driving: Get the Facts*, CENTERS FOR DISEASE CONTROL AND PREVENTION (2017), https://www.cdc.gov/motorvehiclesafety/impaired_driving/impaired-driv_fact_sheet.html [<https://perma.cc/H8T2-W34D>].

¹¹¹ See *supra* text accompanying note 45.

doing so. The Nebraska Supreme Court, perhaps equally pragmatically-minded, did so by finding that Gilliam was not seized, which was contrary to the findings of many other courts, and rests on a notion of a reasonable person who is remarkably resistant to the pressure of the situation of being approached by an officer having activated her vehicle's lights.¹¹² The only other obvious way to legitimate Officer Wagner's conduct would be to conclude that there was RAS in the facts of *Gilliam*, which would involve stretching the logic of *Navarette* even further. The majority claimed in *Navarette* that the tip gave reasonable suspicion for an ongoing DUI offense; although the facts of *Gilliam* also raised suspicion of DUI, it is harder to claim that the offense was *ongoing*, since the car was parked and no longer even parked illegally. Arguably, *Gilliam* presents even less suspicion than *J.L.*, since in *J.L.* the suspect was where the tip predicted he would be, whereas Gilliam's car was not even where it was reported to be, nor did it any longer fit the description of being erratically parked.¹¹³

A final way that the car context is special is not only the different circumstances of the car vis-à-vis any possible interaction between the police and the suspect, but also the different circumstances of the car in terms of the reliability of the anonymous tip. The justices may have less concern about allowing an anonymous tip alone to constitute RAS because of a lower expectation that a 911 call about a car is likely to be false. The Court in *J.L.* was worried about the ease with which a person with a grudge against another could call in a false report describing where her adversary is standing at the moment of the report, in hopes of the police harassing him.¹¹⁴ Such a vindictive report takes a lot more effort to do in the car context: the troublemaker would have to actually follow her prey and figure out in which direction he is driving and where an imaginary offense could have been committed. For instance, a false claim of the kind made in *Navarette* that an individual had driven the caller off the road is much harder in a local street context, so a false reporter would probably have to wait until her intended target had driven to a highway, followed him, and then reported him. Making such a report would involve using a cell phone, rather than a pay phone, with the greater risks of identification that involves.¹¹⁵ Given the greater difficulties of this action, it makes sense to discount any suspicion of false reporting in the car context more than for a similar report on the street. Thus, *Terry* applies differently in the car context not simply because of restrictions on police response to suspicion, but

¹¹² See cases cited *supra* note 105.

¹¹³ *State v. Gilliam*, 874 N.W.2d 48, 52 (Neb. 2016).

¹¹⁴ *Florida v. J.L.*, 529 U.S. 266, 272 (2000) (rejecting an automatic exception to the reasonable suspicion standard for an anonymous tip regarding a firearm because that "would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun.").

¹¹⁵ See *Navarette v. California*, 134 S. Ct. 1683, 1689–90 (2014) (describing the "features that allow for identifying and tracing callers" who utilize cell phones).

because the difficulty of making false reports in the car context makes the likelihood of unfounded reporting considerably lower.

The *Navarette* majority opinion did not address this practical difference, just as it did not extrapolate upon the pragmatic concerns that most of the majority justices expressed at oral argument. Nevertheless, these practical differences between police-citizen encounters on the street and such encounters in the car context are likely to continue to shape the direction of Terry stop jurisprudence going forward.

CONCLUSION

The specific facts of *Navarette* are likely to become irrelevant shortly, due to the sort of technological changes that the majority asserted are already operational. Perhaps 911 calls will effectively cease to be anonymous, a fact that people will become cognizant of, which in turn will affect the assumption of veracity of tips in the car context. But that will not solve the more fundamental problem the case highlighted. It does not take much imagination to contemplate similar scenarios that raise equivalent conundrums for pragmatic justices concerned about effective and efficient policing in the car context. This includes only minor tweaks to the various terrible possibilities that the majority justices played with at oral argument. For example, a caller from a pay phone—who would remain anonymous even under the majority's factual claims about cell phone identification—could report seeing a child being bundled into a car. Given the concerns expressed by the majority justices, it seems highly unlikely that those same justices would insist that the police must scout the scene to see if they could figure out who made the call before pulling over the car they suspect holds the hostage. More likely, the justices who comprised the majority in *Navarette* would find a pragmatic solution that involves another expansion of *Terry*, at least as applied to the car context. The facts of *Gilliam*, which the Court chose not to take up, present another avenue for further expansion of *Terry* in the car context.

There is strong precedent for such pragmatic expansion occurring. *Terry* was crafted by an exceptionally liberal Court,¹¹⁶ and written by the very liberal Chief Justice Warren.¹¹⁷ The liberal *Terry* Court did not fail to anticipate the likely use of the doctrine it was creating. The opinion provided an unusually frank recognition that elucidation of constitutional rights would not prevent police from breaching those rights “where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other

¹¹⁶ In 1968, the Warren Court had an average Martin-Quinn score of -1.22, well over half of one standard deviation more liberal than the Court on average since 1937. See Martin & Quinn, *supra* note 14.

¹¹⁷ The Chief Justice had a Martin-Quinn score of -1.36, making him the most liberal Chief Justice in the post-New Deal era. *Id.*

goal.”¹¹⁸ That is, the opinion recognized the first of the triad of undesirable options available to the police under a strict application of the RAS requirements. It also forthrightly recognized that criminal procedure rules were unlikely to prevent the “wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain”¹¹⁹ at the same time as crafting the doctrine that arguably most enables that harassment.¹²⁰ The most liberal Court since the New Deal nonetheless enabled stops and searches with a lower level of suspicion than previously recognized, out of a pragmatic recognition that police need certain tools available to them in order to operate effectively. *Terry* came in the context of Court rulings that move-on laws,¹²¹ trespass laws,¹²² vagrancy laws,¹²³ and assembly laws¹²⁴ were unconstitutionally vague. *Terry* stops came to fill that gap in police response to suspicious behavior, and even such a liberal Court as the Warren Court recognized that need.

Similarly, the far less liberal Roberts Court—but including the liberal Justice Breyer—is groping towards recognition that police have special needs in the car context due to the limited options available to officers to build reasonable suspicion when responding to unfolding situations. But currently the Court is doing so in a disingenuous manner, failing to articulate the special circumstances of *Terry* stops in the car context and pretending that instead its rulings are reconcilable with its more restrictive rules on RAS generally. Those who support the direction of empowering police in this manner need to develop more convincing rationales that are less jurisprudentially weak. This could include, for instance, a test based on the exigencies created by the mobile nature of cars, similar to the arguments initially provided for creating the automobile exception to the warrant requirement.¹²⁵ Those who dislike the direction the Court is taking for

¹¹⁸ *Terry v. Ohio*, 392 U.S. 1, 14 (1968).

¹¹⁹ *Id.*

¹²⁰ *Floyd v. City of New York*, 959 F. Supp. 2d 691, 691–92 (S.D.N.Y. 2013).

¹²¹ *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91 (1965) (finding that legislation making it unlawful for a person to stand or loiter on the street is unconstitutional, though can be read more narrowly to cover obstruction).

¹²² *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964) (ruling that trespass laws that do not give fair notice that it is a crime to refuse to leave private premises after being requested to do so are prohibited by the Due Process Clause).

¹²³ *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (facially invalidating as unconstitutionally vague a law prohibiting vagrancy, both because the ordinance failed to give a person of ordinary intelligence fair notice of what is forbidden, and because it encourages “arbitrary and erratic arrests and convictions”).

¹²⁴ *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (invalidating a law prohibiting three or more people meeting together on a sidewalk or street corner as unconstitutionally vague as it contains no ascertainable standard, as well as interfering with constitutionally protected conduct).

¹²⁵ *Chambers v. Maroney*, 399 U.S. 42, 48 (1970) (justifying the automobile exception on the basis that although privacy interests do exist in a car, because it is mobile it is typically not practical to get a warrant).

Terry stops in the car context need to respond with pragmatic solutions of how to maintain prior restrictions on RAS while overcoming the dangers of that approach. Only this is likely to convince pragmatic liberal justices, such as Justice Breyer, who may be amenable to a more rights-protective outcome but who simply cannot find a solution that seems palatable. Simply responding in formal terms, as Justice Scalia did, will be to little avail, given these concerns. We can expect more issues raising these dilemmas to come. Currently the future of the *Terry* doctrine in the car context is still open, but advocates need to be speaking in the right terms in order to convince the Court.